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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1231

MANUEL O. DELACRUZ,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Manuel O. DeLaCruz, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered January 24, 1969.

The Opinion of the Court of Appeals for the Fifth Circuit is not yet reported, it is reproduced as Appendix A, *infra,* p. 1a. The Opinion on Rehearing is reproduced as Appendix B, *infra,* p. 1b.

JURISDICTION

The decision of the Circuit Court of Appeals was rendered on December 11, 1968, and Opinion on Rehearing rendered on January 15, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1.

Does the F.E.L.A. (45 U.S.C. §53) permit a district court to diminish a railroad employee's recovery for injuries resulting from the carrier's negligence, where:

(a) The plaintiff-employee's conduct was pursuant to the express direction of his supervisor, who assured employee that it was safe? or where:

(b) The plaintiff employee's conduct did not contribute to the accident?

2.

In an F.E.L.A. case, where the jury is instructed to diminish the award in proportion to the amount of employee's negligence, awards $12,000.00, and separately states in answer to a special issue that the amount of negligence attributable to employee is 50%, may the trial court diminish the award to $6,000.00?

STATUTE INVOLVED

45 U.S.C. §53; that portion of the F.E.L.A. entitled "Contributory Negligence; diminution of damages;" is printed in Appendix C, p. 1c, *infra*.

STATEMENT OF THE CASE

This is an F.E.L.A. case wherein Petitioner DeLaCruz (herein "employee") seeks damages from

the Santa Fe Railroad (herein "employer") for injury sustained while employee was working in a "drop pit" under a disabled locomotive which he was repairing.

The accident occurred as a result of the disabled locomotive, under which employee was working, being struck by a section of cars which was being moved on the repair track.

Employer's negligence was found by the jury, and is not disputed.[1] The issue here is whether there is basis for reducing employee's recovery.

The reduction resulted from a jury finding of 50% contributory negligence.

The undisputed evidence is that employee (who had never before worked in this pit) noted that the pit was deeper than he was tall, and that accordingly it would be impossible for him to see any movement on the repair track.

Accordingly, both employee, and his fellow employee, upon being directed by their foreman to work in the pit, inquired of the foreman as to whether working in the pit would be safe and were told by their foreman:

"You don't have to worry about anything. We

[1] The findings that employer was not negligent in failing to warn plaintiff; and in failing to provide a safe place to work, are wholly without support in the evidence. However, the finding that employer was negligent in striking the locomotive is sufficient to establish employer's primary negligence.

> have blue flag derails that have been installed. Mr. Austin, the rip track foreman, has been notified about it, to leave them [the derails] on, and the yardmaster [who has overall supervision of the yard] has been notified. You fellows are safe. Everything has been taken care of." (Tr. 46-47).

This testimony is corroborated by fellow employee (Tr. 525-533) and was not denied by the foreman.[2]

Actually, the protective derails were, at the time, in place.[3] Later in the day, unbeknownst to employee,[4] they were removed. The removal was flatly contrary to the published work rules, upon which all employees were entitled to rely. The rule was specific:

> ". . . Blue signals must not be removed until all classes of workmen have completed their work and have so notified the designated employee, who will then remove the blue signals." (Tr. 216.[5])

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[2] The foreman was not called as a witness. Employer's failure to call him gives rise to the presumption that the foreman would acknowledge that he gave the directions and assurances as stated by the employees. *Mallory & Co. v. NRLB*, 400 F. 2d 956 at 959 (C.A. 7, 1968).

[3] Blue flag derails on repair tracks were authorized as a substitute for mounting a blue flag on the disabled engine. (Tr.216) See Appendix D.

[4] The assertion (First Opinion of the Court of Appeals at p. 5, lines 13-15) that employee knew that the derails were removed at 4:30 has no record support (Tr. 201-202).

[5] The Court of Appeals ignored this portion of the quoted rule. While quoting other portions of the Rule (Original Opinion, pp.4-5, App. A, *infra*, pp. 4a, 5a) the pertinent rule which we quote in the text was noted only by elipses.

The portion of the Rule quoted in the Opinion appears to require a blue signal on the disabled engine. But had the court below disclosed the entire rule, including that part indicated in the Opinion only by elipses, it would have seen that the Rule was satisfied by the installation of the blue flag derails which the foreman advised had been installed. We set out the entire rule at Appendix D, p. 1d, *infra*.

The removal of the derail opened the repair track for rail traffic. Not aware that the track was open, plaintiff continued to work in the pit as directed. A string of cars was pushed on to this track. The switchman saw the disabled locomotive at a distance of 8 to 10 car lengths, and gave two "easy" signals, and then "stop" and "washout" signals which were ignored by the switch engine operator doubtless because "it was quite apparent that somebody is asleep at the wheel" [of the locomotive which was pushing the string of cars], (Tr. 647.)

The switchman directing the movement of the cars acknowledged that he saw the disabled locomotive in plenty of time to stop.[7] He gave a series of "easy," then "stop," then "washout" or "emergency stop" signals, all of which were ignored. The operator of the switch engine continued to push the string of cars—they crashed into the disabled locomotive, under which plaintiff was working. Employee's injury resulted.

Reasons for Granting the Writ

1.

(a)

Employee's federal rights under FELA are measured one way in the Third Circuit—another in the Fifth.

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[6] See footnote 3, *supra.*

[7] He also acknowledged that the switching crew had earlier been advised of the fact that the disabled locomotive was undergoing repairs on this track. (Tr.540).

The Third Circuit holds it to be "fundamental and prejudicial error for the District Court to charge the jury on the issue of contributory negligence and its diminishing effect upon any verdict it might find," where a plaintiff in an FELA case was assigned by his supervisor certain work to do and was assured that it was safe to do so. The Third Circuit was specific that "He (plaintiff-employee) was justified, in relying on the experience of his superior . . . who was in complete control of the work crew." *Paluch v. Erie, etc. Ry. Co.*, 387 F. 2d 996 at 999 (C.A. 3, 1968); Appendix E, *infra.*, p. 1e.

The Fifth Circuit on the other hand, holds in the instant case that plaintiff-employee was not justified in relying on the experience of his superior, in control of the work, who ordered[8] him to work in the pit, and answered employee's query as to safety:

> "You don't have to worry about anything. We have blue flag derails that have been installed. Mr. Austin, the rip track foreman, has been notified about it, to leave them [the derails] on, and the yardmaster [who has overall supervision of the yard] has been notified. You fellows are safe. Everything has been taken care of." (Tr. 46-47).

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[8] The Fifth Circuit's suggestion of distinction between *Paluch*, where employee was "ordered" to climb the pole; and the case at bar on the ground that "plaintiff was not ordered to work under the locomotive without a blue signal light; *he was merely told that he could*" (Opinion on Rehearing, p. 3) has no record basis. Plaintiff here, as there, did as he was told.

The only basic difference between *Paluch* and the instant case is that in the former the employee was told to climb *up* a pole, while in the latter he was told to climb *down* into a hole.

Moreover, the Fifth Circuit holds (First Opinion, p. 5, footnote 5) and reaffirms on rehearing (Opinion on Rehearing, p. 2) that "the foreman was merely another employee whose affirmation [that it was safe to work in the hole] could be accepted, but did not necessarily free him from negligence as a matter of law."

Thus, a workman in the Fifth Circuit may "accept" his foreman's "affirmation"—but does so at his peril—for accepting such affirmation "did not necessarily free him from negligence. . . ."

But a workman in the Third Circuit is "justified in relying on the experience of his superior. . . ."—and when he does so it is "fundamental and prejudicial error" to charge him with negligence.

Surely, it is important to uniform and fair application of the FELA, and to the thousands of railroad workmen whose rights are governed by this federal statute to resolve the conflict. Workers in the railroad industry are entitled to know whether they may rely upon the directions and assurances made by their bosses.

(b)

They are similarly entitled to know whether they "should . . . anticipate a mistake," (as required by the Circuit Court's Opinion on Rehearing, at p. 3), or whether like all other workmen "in the absence of knowledge, actual or imputed, of another's neg-

ligence, one is not bound to anticipate and guard against its consequences; the duty to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence is apparent. . . " 65A C.J.S., "Negligence," §119, p. 49, and cases there cited.

The Court of Appeals imposes upon the workman in this FELA case a standard of care with respect to contributory negligence greater than is imposed upon the employer in defining primary negligence. Thus, according to the Fifth Circuit: ". . . plaintiff should have anticipated a mistake. . ." (Opinion on Rehearing, p. 3).

This requires railroad employees to exercise a higher degree of care than is required of employees not covered by FELA. The general rule is that "in the absence of knowledge, actual or imputed, of another's negligence, one is not bound to anticipate and guard against its consequences . . ." 65A C.J.S., "Negligence," §119, p. 49.

We had thought that FELA was intended to modify and liberalize common law barriers against recovery by railroad employees for industrial accidents. The Fifth Circuit in the instant case imposes under FELA more restrictive rules than did the common law.

2.

This is further apparent from the fact that plain-

tiff's recovery was diminished for his alleged contributory negligence which could not have contributed to the accident.

The alleged contributory negligence which diminished plaintiff's recovery was threefold: failing to keep a proper lookout for his own safety [*a physical impossibility for he was working, as instructed, in a hole so deep that he could not look out*]; failing to place a blue light on the disabled engine [*not negligence, for the rule required either such light on the engine, or a blue flag derail which the foreman assured him had been installed;*[9] and in placing himself in hazardous position under the engine [*as we have shown, pursuant to his supervisor's instruction, and in reliance upon his foreman's assurance of safety*]. Thus, there was no contributory negligence.

But assuming, *arguendo,* that there was, it did

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[9] The Circuit Court noted (Opinion on Rehearing, Slip Opinion, p. 3) that the applicable rule with respect to protective signals provided alternatives, either (1) a blue signal on the disabled locomotive, or (2) a blue derail elsewhere on the track.

The court seeks to distinguish *Paluch,* as follows:

> "In Paluch the employee was ordered by his foreman to climb a pole. The employee had no reason to know that the pole was unsafe, which, in fact, it was. In the case at bar plaintiff was not ordered to work under the locomotive without a blue signal light; he was merely told that he could. He knew that the rule imposed a personal duty upon him to place a blue signal on the locomotive, although *it offered alternative of a blue derail elsewhere on the track.* It must be obvious, however, particularly when plaintiff was going to be there a number of hours, that marking the engine was safer than a derail down the track, admittedly out of sight, and subject to later removal without plaintiff's knowledge."
> (Emphasis added).

Although the rule required only one or the other alternative, the Fifth Circuit requires of plaintiff, both. And holds him contibutorily negligent for failure to do that which neither the rule nor his foreman required.

not—it could not have—caused the accident. The rule is clear. Restatement, Torts 2d. Vol. 2, p. 510, Sec. 465:

> "The plaintiff's negligence is a legally contributory cause of his harm if, but only if, it is a substantial factor in bringing about his harm. . ."

The accident was caused, as the undisputed evidence shows, solely by the failure of the operator of the switch engine to heed the switchman's series of signals to stop.

The switchman, riding the front boxcar which collided with the disabled locomotive saw the locomotive in plenty of time to stop.[10] He gave an "easy" signal which was relayed through foreman Wilson to the operator of the switch engine.[11] The signal was ignored. A second "easy" signal was given, and ignored. A "stop" signal was given and likewise ignored. A fourth "washout" or "emergency stop" signal was given. The switch engine did not respond to any of these signals, but crashed into the locomotive under which plaintiff was working.

The first signal was given when ten car lengths away from the disabled engine (Tr. 650), which

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[10] He was *ten car lengths* from the disabled engine when the first signal was given (Tr. 650).

[11] The switch engine was being operated by the fireman—the engineer was sitting in fireman's seat.

was bathed in light. The switchman who gave the signals to stop testified (Tr. 659-660):

> "Q. I will ask you this: In view of the circumstances that led up to the collision as you described them to us, had there been a blue light on that engine, would it have made any difference in the ability to have avoided the collision?
>
> A. No, sir, because I could not have seen that blue light before I saw that white light under that engine, it being a duller light."

Thus, even if there had been a red, white and blue light on the disabled engine or had it been bathed in brilliant blue, it would have made no difference. For the function of the blue light would have been to alert the brakeman to the presence of the disabled engine in time to signal the operator of the switch engine. He acknowledged that he was timely alerted.[12] The cause of the accident was thus not a failure to be alert to the presence of the engine—but rather, failure of the fireman operating the engine to respond to a series of signals from the brakeman.

Thus, the courts below have diminished a workman's FELA award based upon his alleged derelictions which were no factor in bringing about his harm.

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[12] The Court's assertion (Opinion, p. 3, note 2) that "had the signals been given sooner, i.e. before a certain ground man was passed, it is likely that they would have been more forcefully brought to the engineer's attention," has no basis in the record. There is not a scintilla of evidence as to when the operator of the switch engine stopped watching his switchman. It is pure speculation that he would have been watching an earlier signal.

Again, at common law a workman is responsible only for such contributory negligence as is "a substantial factor in bringing about his harm."

FELA was enacted to remove common law barriers to the worker's recovery for industrial accidents. Surely, in applying FELA the courts err when they assume, contrary to the evidence, a causal relationship between negligence and injury, which at common law must be shown by evidence to be "a substantial factor in bringing about his harm."

3.

A final error of importance in the application of FELA appears in the trial court's instructing the jury to diminish the damages, and then diminishing that which the jury had already diminished.

The jury was instructed that if they found contributory negligence they were to reduce the recovery "to the extent that you find from a preponderance of the evidence the negligence of [plaintiff] contributed to the injuries . . ."[13] The jury assessed damages of $12,000.00.

The jury found, further, that plaintiff's negli-

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[13] The entire instruction is:

"You are further instructed that if it is shown by a preponderance of the evidence that DeLaCruz was negligent and that his negligence in whole or in part caused his injuries, if any, the amount of damages, if any, you find in answer to Special Issue No. 6 will be reduced to the extent that you find from a preponderance of the evidence the negligence of DeLaCruz contributed to the injuries, if any, of DeLaCruz."

gence contributed 50%. The judgment was for only $6,000.00.

Thus, in addition to following the statutory direction that "the damages shall be diminished *by the jury* in proportion to the amount of negligence attributable to such employee," (45 U.S.C. §53, emphasis added) the courts below have permitted the jury to diminish the damage by that amount—and they have again diminished by a like percentage.

The statute says the diminution shall be "by the jury." It does not authorize the court to again diminish that which the jury has already cut in half.

CONCLUSION

Important questions in the application of a federal statute which applies to thousands of railroad workers are posed by this case. At least one of these is answered one way in Philadelphia—another in New Orleans. The courts below have imposed rules more strict than those applicable at common law against employees who by the FELA are entitled to a liberalization of the roadblocks to recovery erected by the common law. Accordingly, certiorari should be granted, and upon review the judgment should be reversed, and alternatively, either judg-

ment for $24,000.00[14] should be entered for plaintiff, or the case remanded for new trial.

Respectfully submitted,

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[14] Since the jury presumably reduced the damages by 50% because of an an inadmissible finding of contributory negligence in their $12,000.00 finding.

APPENDICES

APPENDIX A

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26062

MANUEL O. DeLaCRUZ,

Appellant,

versus

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

(December 11, 1968)

Before ALDRICH*, GODBOLD and DYER, Circuit Judges.

ALDRICH, Circuit Judge: This is an FELA action brought against the Atchison, Topeka and Santa Fe Railway Company by Manuel O. DeLa Cruz for injuries sustained while working under a locomotive in a pit as a result of the locomotive's being struck by a section of cars that was being moved on a repair track. The trial resulted in a verdict for the plaintiff, reduced, however, by a

*Of the First Circuit, sitting by designation.

special finding of 50% contributory negligence. On plaintiff's appeal the principal objections relate to rulings with respect to the adequacy of the evidence in certain particulars and to some of the special interrogatories.

The basic facts were these. The accident occurred at about 9:30 p.m. The plaintiff, a machinist in the employ of the defendant for 16 years, had arrived at the scene during the afternoon. A company rule required that equipment being worked on be marked at both ends with a blue flag by day and a blue light by night. In this instance no blue signal was shown, and although the locomotive was under a flood light, this did not disclose the presence of the plaintiff. On the track leading to the pit, number 1, and on several parallel repair tracks, cars were being worked on by carmen and moved about during the afternoon. Most of this operation was discontinued at 4:30. At 9:30 a section was being pushed at a slow rate of speed on track 1 in the direction of plaintiff's locomotive. The trainman on the boxcar at the front, seeing the locomotive, gave cautionary signals to the engineer and, eventually, a stop signal, but all were disregarded and the locomotive was struck. There is no dispute as to finding of defendant's negligence;[1] all questions on this appeal relate to plaintiff's.

We consider first plaintiff's claim that any negli-

[1] The jury, in answer to special questions, found defendant not negligent in failing to warn plaintiff of the moving cars, or of failing to provide a safe place to work, but did find negligence in the striking of the locomotive.

gence on his part with regard to failure to mark the locomotive could not, as a matter of law, have contributed to the accident in the light of the fact that the trainman did give signals and the engineer ignored them. The record did not warrant such a ruling. The unintended and perhaps careless striking of other equipment is a matter of common occurrence in yard operations and may be attended by little or no consequences so far as property damage is concerned. There was adequate evidence from which the jury could have found that had it been realized that striking the locomotive in this case would involve danger to personnel more significant steps would have been taken.[2] Plaintiff would clearly have been entitled to an instruction, or to a jury special question, on this issue, but he asked for neither. He was not entitled to a directed finding in his favor.[3]

In connection with some of plaintiff's other contentions it is necessary to consider the record further. First we quote the safety rule, which con-

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[2] The trainman, at the front of the moving cars gave considerable self-contradictory testimony; but at one point he answered the following question in the affirmative. "[I]f there had been a blue light on the cars [*sic* — but the context and adjoining questions show clearly this meant "locomotive"] you would have started all of this much sooner, and in all likelihood, would have had it completed or you could have given some warning earlier. if the blue light that should have been on there, was on there. Is that correct? A. That is right, sir." On the record, had the signals been given sooner, *i.e.*, before a certain ground man was passed, it is likely that they would have been more forcefully brought to the engineer's attention. Plaintiff, quite properly, does not assert the "last clear chance" doctrine. *Atlantic Coast Line RR. Co.* v. *Anderson*, 5 Cir., 1959, 267 F.2d 329, *cert. denied*, 361 U.S. 841.

[3] Nor, of course, could plaintiff revive rights lost by failure to make timely objection, *Ford* v. *United Gas Corp.*, 5 Cir., 1958, 254 F.2d 817, *cert. denied* 358 U.S. 824, by the device of moving for a new trial. *Francis* v. *Southern Pac. Co.*, 1948, 333 U.S. 445; *Hobart* v. *O'Brien*, 1 Cir., 1957, 243 F.2d 735.

cededly was not complied with. The presently material portions read as follows.

> "Mechanical Department employees will comply with Operating Department Rule 26, which reads: 'A blue signal, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Each class of workmen will display the blue signals and the same workmen are alone authorized to remove them. Other equipment must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen. . . .

INSTRUCTION FOR LOCOMOTIVE, CAR AND OTHER MECHANICAL DEPARTMENT EMPLOYEES.

A. The blue signal referred to in Operating Department Rule 26, requires a blue flag by day or a blue light by night.

Except as provided in the last paragraph of operating Department Rule 26, no carman, locomotive repairman or electrician will place himself in a hazardous position under or about an engine, car or train until it is

known that blue signals have been properly displayed. . . ."[4]

Plaintiff's first evidentiary contention is that he did not have to comply with the blue light rule because his foreman had told him that a protective blue-marked derail was on the track, and the track foreman had been informed of his presence. It is true that plaintiff so testified. However, his pretrial statement was inconsistent therewith. The jury was warranted in disbelieving his in-court testimony.[5]

Next, plaintiff said that a blue derail had been on the track during the afternoon, and he assumed it would remain. To this defendant replied that it was customary to remove derails at 4:30 when the carmen left, as plaintiff knew, and that plaintiff had seen the consequence of this even on the day in question. Plaintiff, in turn, admitted that after 4:30 he had seen cars being moved on the other tracks past where the derails had been, but said he saw none on No. 1. There was testimony, however, that cars had been so moved on track 1 at 5 o'clock.

Finally, plaintiff tells us, "there was no evidence

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[4] Plaintiff makes an elaborate argument that the jury could not reasonably find that this rule applied to him personally. The short answer is that we do not agree.

[5] It may also be said that if it was appropriate, as we believe it was, for the jury to find defendant negligent in not apprehending the possibility of a person being on the locomotive even though the blue signal was not shown, it could find plaintiff negligent in relying upon the word of another employee to relieve him of his duty to protect himself, particularly when this duty could have been easily and effectively complied with.

that the blue signals were available." This is simply not so.

At the conclusion of the evidence, to substitute for an enigmatic general verdict, *see Page v. St. Louis Southwestern Ry. Co.*, 5 Cir., 1965, 349 F.2d 820, 822, pellucidity, the district court submitted a number of special questions to the jury. At first blush we might agree with plaintiff that there were too many with respect to contributory negligence, and that some were, in effect though not in language, repetitious. However, on consideration we believe that any possible error was not only not prejudicial, but was due to the many forms of plaintiff's resistence to the defense of contributory negligence. We will discuss only the most questionable of these instructions.

> 3. "Do you find from a preponderance of the evidence that DeLaCruz was negligent in one or more or all of the following respects: . . . (f) In placing himself in a hazardous position under or about the engine in question. Answer 'yes' or 'no' ANSWER *Yes*"

While, standing alone, this question might look as if plaintiff were being charged with assumption of the risk — an interpretation that he did not claim, either in the district court or here — it will be seen by reference to the last-quoted paragragh from the blue signal rule, supra, that the form of this question was with specific reference thereto.

In sum, we find no error either with regard to the failure to direct a verdict of no contributory negligence, or with respect to the form of the special questions.

Plaintiff's other objections may be readily disposed of. There was no need for the court to put to the jury on the voir dire questions as to whether they would be impressed by certain types of damage testimony. It is to be assumed that jurors will follow at least all routine instructions as to how they should resolve issues. Such inquiry is not, as plaintiff contends, a legal concomitant of the right of peremtory challenge.

Rather, the district court, whose discretion is broad in this area, might well feel that this was but a subtle attempt on counsel's part to lay a foundation for his case.

Plaintiff's claim that the jury finding on damages itself reflected the 50% contributory negligence adjustment and that the court's subsequent reduction made a double reduction is contrary to the plain language of the instructions and the jury questions themselves.

Finally, although the plaintiff's gross recovery was perhaps incommensurate with plaintiff's damage testimony, whether or not there should be a new trial was a matter within the discretion of the district court. We find no abuse. Plaintiff's damage evidence was substantially disputed.

AFFIRMED.

APPENDIX B

In The

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26062

MANUEL O. DeLaCRUZ,

Appellant,

versus

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

(January 15, 1969)

ON PETITION FOR REHEARING
Before ALDRICH*, GODBOLD and DYER, Circuit Judges.

ALDRICH, Circuit Judge: Plaintiff appellant's petition for rehearing, concluding that our opinion may be "accurately characterized" in the language of the court in *Page v. St. Louis SW. Ry.*, 5 Cir., 1965, 349 F.2d 820, 827, as "confusion and a proliferation of metaphysical terms scarcely understand-

*Of the First Circuit, sitting by designation.

able to the most astute scholar," essentially repeats the arguments made in his original brief, which is not the intended function of such a petition. However, one argument we possibly dealt with insufficiently, as plaintiff has replied with an unjustifiable, but perhaps superficially plausible contention.

According to plaintiff's testimony he was told by his foreman that the track was marked with a blue derail and that it would be safe for him to work under the locomotive even though it, itself did not bear a blue signal. In his original brief plaintiff first inquired how he could be negligent "when he relies upon the representation of his foreman that he is working under safe conditions . . .?" Later, immediately prior to the claim, which the record totally refutes, that "there was no evidence that the blue signals were available," plaintiff amplified this by stating, "Surely neither the railroad, or the law, or this Court, would expect the crewmen to challenge the work [sic] of their boss. If one did he would not long be a crewman or employee!" In response, we referred to the testimony that his "foreman had told him that a protective blue-marked derail was on the track," but stated that so far as protecting him from contributory negligence was concerned, the foreman was merely another employee whose affirmation could be accepted, but did not necessarily free him from negligence as a matter of law.

In his petition for rehearing plaintiff says he was not merely relying upon the foreman's word, but was following instructions, so that his case is on

"all fours" with the case of *Paluch v. Erie, L. RR.*, 3 Cir., 1968, 387 F.2d 996. It is not. In *Paluch* the employee was ordered by his foreman to climb a pole. The employee had no reason to know that the pole was unsafe, which, in fact, it was. In the case at bar plaintiff was not ordered to work under the locomotive without a blue signal light; he was merely told that he could. He knew that the rule imposed a personal duty upon him to place a blue signal on the locomotive, although it offered the alternate of a blue derail elsewhere on the track. It must be obvious, however, particularly when plaintiff was going to be there a number of hours, that marking the engine was safer than a derail down the track, admittedly out of sight, and subject to later removal without plaintiff's knowledge.

As we pointed out, the possibility of someone's error, even the plaintiff's warranted the jury in finding the railroad negligent in spite of the absence of a blue signal on the locomotive. By the same token, the jury could have found that the plaintiff should have anticipated a mistake, particularly when it would have been so easy to have protected himself. If plaintiff had been ordered by the foreman not to place a signal on the locomotive, that would have been another matter. The record required no such finding.

The jury concluded that both parties were equally negligent. We believe this was not only justifiable, but entirely reasonable. The petition for rehearing is denied.

APPENDIX C

45. U.S.C.A. §53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

APPENDIX D

INSTRUCTIONS for Locomotive, Car and Other Mechanical Department Employees.

The blue signal referred to in Operating Department Rule 26, requires a blue flag by day or a blue light by night.

Metal signs, painted blue, suspended from brackets or used in connection with derails on repair tracks, will be regarded as proper blue signals prescribed by Operating Department Rule 26.

Except as provided in the last paragraph of Operating Department Rule 26, no carman, locomotive repairman or electrician will place himself in a hazardous position under or above an engine, car or train until it is known that blue signals have been properly displayed.

When more than one class of these workmen are employed under or about an engine, car or train one set of blue signals will be used and an understanding reached by employees involved as to who will display and remove the blue signals. Blue signals must not be removed until all classes of workmen have completed their work and have so notified the designated employe, who will then promptly remove the blue signals.

The Company does not require its employes to incur risks and directs them to exercise proper care and judgment to protect themselves. (Portions of rule ignored by Circuit Court in italics)

APPENDIX E

PAUL P. PALUCH, Appellant,

v.

ERIE LACKAWANNA RAILROAD COMPANY

No. 16463

United States Court of Appeals
Third Circuit

Argued Sept. 29, 1967.
Decided Jan. 3, 1968.

Rehearing Denied Feb. 6, 1968.
Before McLAUGHLIN, HASTIE and FORMAN, Circuit Judges.

OPINION OF THE COURT

FORMAN, Circuit Judge.

[1] Apellant, Paul P. Paluch, brought this action in the United States District Court for the District of New Jersey under the Federal Employers' Liability Act[1] against his employer, Erie Lackawanna Railroad Company (Railroad), to recover damages for injuries sustained in the course of his employment. The jury rendered a verdict for the appellant. Attacking the verdict, principally on the ground of

[1] 45 U.S.C #51 et. seq.

it's gross inadequacy, the appellant sought a new trial. From the order of the District Court denying the motion for a new trial, appellant brought this appeal.[2] Appellant raises two issues: first, he renews his contention that the verdict is grossly inadequate, and second, he argues that the verdict is contrary to law.

The essential factual background is that appellant, aged 52, at the time of his accident on February 13, 1964, was employed as a signalman. He was one of a crew of workmen under the direction of a foreman, William Brickman, who was to remove wires from telegraph poles along the Railroad's right of way on the Boonton Branch west of its station at Paterson.

Appellant was assigned to the task of cutting the wires attached to cross arms at the top of a pole 29 feet high. He had never performed such work and was unfamiliar with the condition of the pole. Appellant inquired from Mr. Brickman, who was long experienced, whether the pole was safe. He was assured that it was. Thereupon he mounted the pole stationed himself at one of the cross arms and cut each of the wires attached thereto pursuant to

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[2] Except in extraordinary circumstances, not present here, an order denying a motion for a new trial is not appealable. However, where as here, the appeal is timely taken in regard to the final judgment and the intent of the appellant to appeal from the final judgment is clear, it is the general rule to treat the appeal from the order denying the new trial as harmless error and to consider the appeal as if taken from the final judgment. Croming v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142, 144 (3 Cir. 1964); 6A Moore, Federal Practice, ¶ 59.15 [1] (2d ed. 1966). Accordingly, this appeal will be treated as if taken from the final judgment.

a signal given him by Mr. Brickman. The wires were simultaneously cut from another pole and when thus freed they were conducted by other workers to a truck equipped with a winch, which wound the removed wires on a reel. As appellant cut the last wire the pole toppled to the ground with appellant still clinging to its side.

The pole that fell was known as a "dead end" pole. Wires ran to it and then down to a relay case in the ground. The evidence indicated that the pole which appellant was required to climb was rotted and completely severed at ground level. A "stub" pole had been driven beside it and was lashed to it with wire in order to support it. Mr. Brickman testified that on the day before the accident he went to the job site to inspect the condition of the pole. He stated that he pushed the pole back and forth and also stuck his penknife into the stub pole at ground level. From his tests he concluded that the pole was safe to climb. After the accident it was learned that the stub pole too had rotted just below the ground level.

As a result of the fall appellant, was rendered unconscious for about seven hours. One of the step spikes on the pole penetrated his face fracturing his cheekbone; his right tibia was also fractured resulting in a permanent one-quarter inch shortening of the leg; he sustained a concussion with minute hemorrhages within the brain tissue. Appellant was confined in a hospital as a result of these

injuries for 28 days. He testified that among the effects of his injury his right wrist, which was sprained by the fall, swells when he attempts to climb a ladder; that he still suffers from dizziness when he bends too far forward or backward; and that he has difficulty concentrating because of a burning sensation in his head and ringing in his ears.

Seven months after the accident appellant returned to work. His loss of wages during that period totaled $3,636.80, and together with the medical expenses he personally incurred, it was shown that his out of pocket expenses amounted to at least $4,210.55. The verdict the jury returned was for $6,000.

The Federal Employers' Liability Act provides that contributory negligence shall not be a bar to recovery under the Act. If an employee is shown to have been contributorily negligent then the jury shall be instructed to diminish the damages recoverable in proportion to the employee's negligence.[3] The District Judge submitted the case to the jury with these instructions on the issue of damages.

[2-5] In maintaining that the verdict was con-

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[3] U.S.C. §53.

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *."

trary to law, appellant asserts that the Railroad "made no reference to any act of contributory negligence on the part of the plaintiff, nor did it present any proof of it." In a case such as this, under the Federal Employers' Liability Act, the burden of proving contributory negligence is, of course, on the Railroad.[4] The entire record has been scrutinized to determine the validity of appellant's position that the Railroad failed to establish any contributory negligence. The evidence clearly indicated that appellant was totally inexperienced in the work he was instructed to undertake. He was justified in relying on the experience of his superior, Mr. Brickman, who was in complete control of the work crew. Mr. Brickman indicated to appellant that he had tested the pole and found it to be safe. As it turned out, the stub pole, as well as the main pole, was rotted below the surface level. If Mr. Brickman, a man of experience, did not discover the defect, there is no ground to assert that the appellant was contributorily negligent on the basis that he did not find the pole defective, a contention advanced by the Railroad. Certainly, it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one.[5] From the evidence presented at the trial of this case, a jury could not properly find a lack of due care by the appellant. It was, therefore, fundamental and prejudicial error for the District Court to charge the jury on the

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[4] Central Vermont Ry. v. White, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed 1433 (1915); Mumma v. Reading Co., 247 F. Supp. 252 (E.D. Pa. 1965).

[5] Morran v. Pennsylvania R.R. Co., 321 F.2d 402, 403 (3 Cir. 1963).

issue of contributory negligence and its diminishing effect upon any verdict it might find in favor of appellant.[6]

Counsel for appellant, however, failed to seasonably object to the District Judge's charge on contributory negligence. It was not until the oral argument in support of the motion for a new trial that counsel for appellant argued that no proof had been offered by which appellant could be found contributorily negligent. In denying the motion for a new trial the District Judge declined to rule as a matter of law that there was no contributory negligence. Indeed, he took occasion then to allude to the probable finding by the jury of contributory negligence as the reason for the verdict of $6,000.

[6-8] Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C.[7] has not been overlooked. It generally prevents a party from assigning as error on appeal an instruction to the jury when no objection to the instruction was made prior to the jury's retirement. A purpose of the rule is to assure the trial court an opportunity to make appropriate cor-

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[6] Smith v. Lauritzer, 356 F.2d 171 (3 Cir. 1966); Eichmann v. Dennis, 347 F.2d 978 (3 Cir. 1965); Moore v. Smith, 343 F.2d 206 (3 Cir. 1965); Morran v. Pennsylvania R.R. Co., 321 F.2d 402 (3 Cir. 1963); O'Neill v. Reading Co., 306 F.2d 204 (3 Cir. 1962).

[7] Rule 51 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

rection of its rulings and instructions.[8] The lapse of appellant's counsel in failing to comply with the rule is not to be encouraged.[9] Nevertheless, this court has declined to permit such a technicality to cause a miscarriage of justice.[9] In Freifield v. Hennessy, 353 F.2d 97, 99 (3 Cir. 1965), the court stated:

> "Where it is apparent on the face of the record that counsel failed to object to a fundamental and highly prejudicial error, and this failure may have resulted in a miscarriage of justice, the error must be noticed and rectified."

Thus, in rare instances, where fundamental error occasions a miscarriage of justice, this court will notice such error despite counsel's failure to comply with rule 51.[10] The charge to the jury in this case on an issue on which no evidence had been offered was such fundamental error. Allowing the jury to speculate on contributory negligence and thereby possibly to diminish the compensation recoverable, under the circumstances of this case, was a miscarriage of justice.

This fundamental error compels a new trial. It is

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[8] 5 Moore, Federal Practice ¶ 51.04 (2d ed. 1966).

[9] In Atkinson v. Roth, 297 F.2d 570, 575 (3 Cir. 1962), the court in commenting on counsel's failure to enter a proper objection, stated:
"We are not unconcerned with the failure of counsel to perceive and bring to the attention of the court, on the record, such matter. But, the function of the trial judge necessarily extends beyond conclusive reliance upon counsel. It is the administration of justice with which we are dealing, and this includes the prevention of a miscarriage of justice."

[10] Ratay v. Lincoln Natl Life Ins. Co., 378 F.2d 209 (3 Cir. 1967); cert. denied, 389 U.S. 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967); Freifield v. Hennessy, 353 F.2d 97 (3 Cir. 1965); Mazer v. Lipschutz, 327 F.2d 42 (3 Cir. 1963); McNello v. John B. Kelly, Inc., 283 F.2d 96 (3 Cir. 1960).

therefore unnecessary for the court to consider appellant's contention as to the gross inadequacy of the verdict.

[9] Appellant seeks a new trial restricted to the issues of damages, or, in the alternative, a new trial on all issues. The jury, in finding a verdict for the plaintiff, necessarily concluded that the defendant was negligent. Since the issue of damages in this case is distinct and separable from the issue of liability, and since the interests of justice will be best served by doing so, a new trial will be ordered restricted to the issue of damages."

The judgment of the District Court will be reversed and a new trial will be ordered limited to the issue of damages.

GERALD McLAUGHLIN, Circuit Judge (dissenting, on grounds immaterial to this Petition).

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[1] Rule 59(a) Fed.R.Civ.Proc., 28 U.S.C.: Cromling v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142 (3 Cir. 1964); Darbrow v. McDade, 255 F.2d 610 (3 Cir 1958).

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No. 1231

IN THE

SUPREME COURT OF THE UNITED STATES

MANUEL O. DeLaCRUZ, *Petitioner*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Respondent's Reply to Petition For Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

QUESTIONS PRESENTED

1. Is there evidence to support the findings of the jury that Petitioner (Plaintiff) was negligent?

2. Is there evidence to support the findings of the jury that Petitioner's (Plaintiff's) negligence played any part in bringing about or causing Petitioner's injuries?

3. Was there error in the charge of the Court on damages and can Petitioner (Plaintiff) complain of error in the charge in the absence of an objection to the charge?

STATEMENT OF THE CASE

Respondent, hereinafter called Defendant, cannot accept the "STATEMENT OF THE CASE" made by Petitioner, hereinafter called Plaintiff, for the reason that such statement is incomplete and inaccurate.

Plaintiff alleged three acts of primary negligence on the part of Defendant and Defendant alleged six acts of contributory negligence on the part of Plaintiff. Following the suggestion of the Fifth Circuit Court of Appeals in *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, the Trial Court submitted this case to the jury by a general charge with special interrogatories. The findings of the jury on these special interrogatories were as follows (T. 994):

1. That Defendant *was negligent* (d) in causing a string of cars to strike the diesel engine upon which DeLaCruz was working, and that the Defendant *was not negligent* (a) in failing to warn of the coupling and moving cars into the diesel engine on which Plaintiff was operating, (b) in failing to provide an adequate and safe system for warning Plaintiff of the railroad company's intention to move cars on the track on which Plaintiff was working, and (c) in failing to provide DeLaCruz with a safe place to work.
2. That one or more or all of such acts (those found in Special Issue 1) played any part, no matter how small, in actually bringing about or causing Plaintiff's injuries.
3. That Plaintiff *was negligent* (a) in failing to keep a proper lookout for his own safety, (c) in failing to place a blue flag or blue light warning

on the car or engine on which Plaintiff was working and (f) in placing himself in a hazardous position under or about the engine in question and that Plaintiff *was not negligent* (b) in failing to listen for the switch engine and cars on the track where the accident occurred, (d) in failing to notify the enginemen and firemen that the work was being done on the car or engine in question and (e) in failing to place a metal sign painted blue on the derail on the track in question.

4. That one or more or all of such acts (those found in Special Issue 3), played any part, no matter how small, in bringing about or causing Plaintiff's injuries.

5. That the extent to which the negligence of Plaintiff contributed to his injuries was 50%.

6. That the total damages of Plaintiff were $12,000.

Thus, the Trial Court felt that there was evidence to warrant the submission of these acts of contributory negligence on the part of Plaintiff. Following the return of the verdict, the Plaintiff contended before the Trial Court that there was no evidence to support the findings of the jury on the issues of contributory negligence, but once again the Trial Court disagreed and in accordance with the verdict of the jury, entered judgment on behalf of Plaintiff in the amount of $6,000.

Following the entry of judgment by the Trial Court, Plaintiff appealed to the Fifth Circuit Court of Appeals and contended among other things that there

was no evidence to support the findings of contributory negligence by the jury. The Fifth Circuit Court of Appeals in an opinion reported at 405 F.2d 459 carefully considered all of the contentions made by Plaintiff and concluded that the findings by the jury to the effect that both Plaintiff and Defendant were negligent, were not only justifiable, but entirely reasonable.

Plaintiff states on page 4 of his petition that the removal of the derails was contrary to the rules but this is simply not supported by the record. The undisputed testimony was to the effect that the derails were removed at 4:30 p.m. when the carmen finished their work on these tracks and the Plaintiff did not actually begin working on the diesel unit until about 6 p.m., as the diesel unit was not brought to the track until that time (T. 40).

REASONS FOR DENYING THE WRIT

I.

This Court has clearly stated in Rule 19, Supreme Court Rules, that a writ will be granted only where there are special and important reasons therefor. Plaintiff has failed in this regard in that the decision of the Court of Appeals in this case does not fall within any of the reasons stated in Rule 19(b), Supreme Court Rules.

II.

There is ample evidence to support the findings of the jury that Plaintiff was negligent. The jury found that Plaintiff was negligent in three respects as follows:

1. In failing to keep a proper lookout for his own safety.
2. In failing to place a blue flag or blue light warning on the car or engine on which Plaintiff was working.
3. In placing himself in a hazardous position under or about the engine in question.

Thus, the verdict is supported by evidence if there was any evidence to support any of these findings of the jury.

Before discussing specifically the evidence that does support these findings of the jury, Defendant wants to discuss and cite to the Court the authorities which control in the consideration of the question of the

sufficiency of the evidence to support these findings of the jury.

This Defendant and many other railroads have felt many times after a jury verdict that there was no evidence to support the finding of the jury to the effect that the Defendant railroad was guilty of acts of negligence. However, in numerous F.E.L.A. cases, this Court has emphasized time and again that the questions of negligence and causation are for the jury and not the Court. In the leading case of *Rogers v. Missouri Pacific Co.*, 352 U.S. 500 (1957), the Court made it plain that the basic intention of the Federal Employers Liability Act is to leave the fact-finding function on negligence exclusively in the jury in all but the infrequent cases where fairminded jurors could not honestly differ.

The decisions of the Supreme Court subsequent to *Rogers* clearly show that the Court fully intends to apply forcefully the principles expressed in *Rogers*. Time after time the Court has granted certiorari to reverse a lower court which had taken the case away from the jury either by directing a verdict or granting a judgment n.o.v. In the following illustrative cases, a jury verdict was overturned by the trial court or intermediate appellate court, only to be reinstated by the Supreme Court. See, e.g., *Davis v. Baltimore & Ohio Railroad*, 379 U.S. 671 (1965) (per curiam); *Gallick v. Baltimore & Ohio Railroad*, 372 U.S. 108 (1963); *Dennis v. Denver & Rio Grande Western Railroad*, 375 U.S. 208 (1963) (per curiam); *Basham v. Pennsylvania Railroad*, 372 U.S. 699 (1963) (per

curiam); *Harris v. Pennsylvania Railroad*, 361 U.S. 15 (1959), and the compilation of thirty such cases in the concurring opinion of Justice Douglas; *Webb v. Illinois Central Railroad*, 352 U.S. 512 (1957).

In holding that reversible error has been committed by a lower court's invasion of the function of the jury, this Court has relied on well established principles of law. It was early held in F.E.L.A. case law that the jury's verdict on the issue of negligence could be reversed "*only when there is a complete absence of probative facts to support the conclusion reached*" by the jury. *Lavender v. Kurn*, 327 U.S. 645, 653 (1945) (emphasis added). *Accord, Planters Manuf. Co. v. Protection Mut. Ins. Co.*, 380 Fed.2d 869, 874 (5th Cir. 1967) cert. denied, 389 U.S. 930. But whenever the evidence is such that fairminded men might draw differing inferences therefrom, there is an evidentiary basis for the jury's verdict, and the appellate court's function in that regard is exhausted. It is immaterial that the court might have chosen a contrary inference which it feels is more reasonable. Ibid. See also *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1941); *Wilkerson v. McCarthy*, 336 U.S. 53. Plainly these cases evidence a very restrictive view of the circumstances under which a jury verdict may be disregarded in F.E.L.A. cases. 2B *Barron & Holtzoff*, §1075 at 401.

These principles concerning the significance of the jury's verdict apply, of course, with equal force in all F.E.L.A. cases, no matter whether the jury happens to decide in favor of the employee or employer. They

apply also where the attack is being made on the findings of contributory negligence by the jury just the same as they apply to attacks upon the findings of primary negligence by the jury. This is made quite clear by the opinion in *Page v. St. Louis Southwestern Ry. Co.*, supra, as follows:

> "As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. *So far as negligence is concerned, the standard is the same-ordinary prudence-for both Employee and Railroad alike.* Unless a contrary result is imperative, it is, at best, unfortunate if two standards of causation are used. We think there are several reasons why substantively there is no such imperative." (Emphasis added).

The effect of a finding of contributory negligence by the jury has been discussed in many cases. For instance in *Johnson v. Erie Railroad Co.*, 2nd Cir., 250 F.2d 283, the verdict in an F.E.L.A. case was for the defendant and the plaintiff appealed asking the appellate court to hold that plaintiff was not guilty of contributory negligence as a matter of law. Of course, this is the same contention being made by Plaintiff in this case and the court held as follows:

> "Plaintiff's assignment of error is based upon the judge's charge that the jury might consider whether he was guilty of contributory negligence in mitigation of damages. He asserts that on the facts he could not have been held negligent. But we cannot absolve him of negligence as a matter of law. At the time of his injury he was working

> in a stationary railroad car, stowing mail packages tossed to him from a truck alongside; and he was injured when a locomotive struck the car, throwing him against some hard object and thus injuring his leg. As said in Daulton v. Southern Pac. Co., 9 Cir., 237 F. 2d 710, 713: 'The lesson seems to be in Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668, that the jury can choose any reasonable hypothesis and that the rule works both ways.' The jury may have concluded that plaintiff should have taken some concern for a possible striking and the way in which he should fall, knowing, as he had to know (the car being sandwiched between two others on a spur track), the direction from which any blow must come. At least this does not seem too unreasonable an hypothesis for the jury to choose."

In considering the evidence to support the findings of the jury, the appellate court must take the evidence in the light most favorable to Appellee. This rule has been stated in *Barnes v. Norfolk Southern Railway Co.*, 4th Cir., 333 F.2d 192, as follows:

> "It is for the jury to draw inferences from the facts and 'only when there is a complete absence of probative facts to support the conclusion reached does reversible error occur.' Melville v. State of Maryland, 155 F. 2d 440 (4 Cir. 1946). This court must take the evidence in the light most favorable to the appellee where a jury verdict supports his position. Atlantic Greyhound Corp. v. Eddins, 177 F. 2d 954 (4th Cir. 1949)."

The rule is also stated by the 7th Circuit Court of Appeals in *Teets v. Chicago, South Shore & South*

Bend Railroad, 238 F. 2d 223, as follows:

> "When ruling on a motion by the defendant for a directed verdict the trial court may consider only the evidence favorable to the plaintiff and all reasonable inferences which the jury may draw therefrom which tend to support the plaintiff's case. Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610. Under this standard the trial judge is precluded from passing on the credibility of witnesses or weighing the conflicting evidence Lavender v. Kurn, supra; Tennant v. Peoria & P.U. Ry. Co., supra. Thus, if there is a choice of conflicting versions of the way the accident happened, the decision as to which witness is telling the truth, and inferences to be drawn from uncontroverted as well as controverted facts are for the jury. Stanford v. Pennsylvania Ry. Co., 7 Cir., 171 F. 2d 632."

Plaintiff was an experienced machinist who had worked for Defendant for 16 years (T. 30). In the Amarillo yards, machinists work on locomotives and carmen work on boxcars and the work is generally done in different places (T. 190). The work on the locomotives is ordinarily done in the area of the roundhouse and the work on the boxcars is usually done in the area of the repair tracks where this accident occurred (T. 190). The machinists work three shifts so that work is done on the locomotives 24 hours a day (T. 191). However, this is not true with regard to the carmen as they work only one shift between

8 a.m. and 4:30 p.m. so that all of the repair work that is normally done on the repair tracks where this accident occurred generally terminates at 4:30 p.m. (T. 194). The drop pit where this accident occurred is normally used to change the wheels on passenger cars so that all work at the drop pit would normally be done during the daytime (T. 195).

During the time that carmen are working on the repair tracks they are protected by a blue flag derail and also by locked switches at either end of the tracks (T. 738). The switches are locked to prohibit any unauthorized switching of the tracks and the only way that they can be moved is by the yardmaster seeking permission from the foreman of the carmen to unlock the tracks and to have the blue flag derail removed (T. 738). If the blue flag derail is removed, then the workmen on the tracks are notified through a loud speaker and they are required to quit working and stay clear during that period of time (T. 739). At the close of the shift of the carmen at 4:30 p.m., the blue flag derails are removed and the switches are unlocked (T. 739). The cars that have been worked on during this daytime shift by the carmen are taken off of the repair and conditioning tracks by the switching crews during the nighttime and the tracks are refilled with cars to be worked upon the following day (T. 739). *If work is to be done on these tracks by the machinists between 4:30 p.m. and 8 a.m. the next morning, it is the responsibility of the machinist who is working on the track to protect himself* (T. 739-740). The machinist is to protect

himself by providing blue flag protection and to see that the switches are locked in order to assure that there is no switching movement coming into the track where the machinist is working (T. 740). In addition to the blue flag derail, there are also blue lights and blue flags (T. 740-741).

The Plaintiff testified that the Defendant had issued safety rules to be followed by carmen and machinists so that they would be protected in working on repair tracks (S.F. 207). Such rules are encompassed in a booklet called "Instructions for Locomotive, Car and Other Mechanical Department Employees" and such book was introduced into evidence as Defendant's Exhibit 7 (T. 211). The pertinent portions of such rule provide as follows beginning of page 3 of such book:

> "Mechanical Department employees will comply with Operating Department Rule 26, which reads: 'A blue signal, displayed at one or both ends of an engine, car or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Each class of workmen will display the blue signals and the same workmen are alone authorized to remove them. Other equipment must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen.
>
> When emergency repair work is to be done under or about cars in a train and a blue signal is not available, the engineman and firemen will be notified and protection must be given those engaged in making repairs.'

INSTRUCTIONS FOR LOCOMOTIVE, CAR AND OTHER MECHANICAL DEPARTMENT EMPLOYES.

A. The blue signal referred to in Operating Department Rule 26, requires a blue flag by day or a blue light by night.

Metal signs, painted blue, suspended from brackets or used in connection with derails on repair tracks, will be regarded as proper blue signals prescribed by Operating Department Rule 26.

Except as provided in the last paragraph of operating Department Rule 26, no carman, locomotive repairman or electrician will place himself in a hazardous position under or about an engine, car or train until it is known that blue signals have been properly displayed.

When more than one class of these workmen are employed under or about an engine, car or train one set of blue signals will be used and an understanding reached by employes involved as to who will display and remove the blue signals. Blue signals must not be removed until all classes of workmen have completed their work and have so notified the designated employe, who will then promptly remove the blue signals.

The Company does not require its employes to incur risks and directs them to exercise proper care and judgment to protect themselves.

B. On an engine, the blue signal must be displayed in the bracket provided for that purpose on the engineman's side.

On a train, the blue signal must be displayed on end hand-hold on the road engineman's side.

> On a car or cut of cars, the blue signal must be displayed on the end hand-hold at the left as the employe displaying the signal faces the end of the car." (Emphasis added).

In spite of the fact that Plaintiff knew that the switching crew would normally expect that there would be no machinists working on Repair Track No. 1, the evidence was undisputed that Plaintiff had not complied with the blue flag rule (T. 533 & 614). Plaintiff testified that he knew that the normal practices was for the derail and blue flag to go down when the carmen quit working in the afternoon so that the switchmen could move cars in and out of the various tracks before 8 a.m. the next morning (T. 201-202). In addition to this, although the accident according to Plaintiff occurred at about 9:30 p.m., he had been in the vicinity of the drop pit from 4 p.m. until the time of the accident and he saw the switching crews putting cars in and out of the various tracks that are known as the rip tracks (T. 206). Actually, the Plaintiff testified that he was in the area of the pit from 4 p.m. until the time the accident occurred at 9:30 p.m. (T. 206), but that the diesel engine was not brought to the pit until about 6 p.m. so that from 4 p.m. until 6 p.m., Plaintiff was just getting ready to work on the diesel unit (T. 225). Plaintiff was not working in the pit underneath the diesel engine until about 20 to 30 minutes before the accident occurred (T. 206), so that Plaintiff was well aware of the fact that the switching crew was moving cars in and out of the repair tracks.

Witness Bixenman testified that in accordance with the custom and practice, it would be the responsibility of Plaintiff to see that the blue flag was placed on the engine in order to protect the machinists (T. 575-576). Also, witness Luginbill testified that it was the responsibility of the machinist to see that the blue flag rule is complied with (T. 739-740).

Witness Wilson testified that at about 5 p.m. on the date of the accident, the same switching crew had been on Track No. 1 where the accident occurred and had pulled out the cars that had been worked on during the day (T. 591). He also testified that in switching of the type that they did on the repair track, they will frequently cut cars loose to run into other cars and put cars into other cars for the purpose of coupling (T. 611-612). This is the normal procedure unless a machinist has notified them that they are working on the track by putting out a blue flag in the daytime or a blue light at night which was not done in this case (T. 613).

Under the circumstances of this case, it would be an "undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, supra.

III.

There was ample evidence to support the finding of the jury that Plaintiff's negligence played a part in bringing about or causing Plaintiff's injuries.

The question of causation was for the jury and we again refer the Court to the cases cited under II above. Certainly the failure of Plaintiff to keep a proper lookout for his own safety contributed to this accident. Also, there is no question but what the act of Plaintiff in placing himself in a hazardous position under the engine without a determination that the blue flag derail had been put in place contributed to the accident in question and any injuries sustained by Plaintiff.

With regard to causation in failing to place a blue flag warning on the diesel engine in question, several witnesses testified with regard to the effect of this failure on the part of Plaintiff.

Witness Wilson testified that the crew did not know that there was a diesel engine at the other end of the track (T. 613) and if there had been a blue light out, then it would be a notice of danger to the crew in their switching on the tracks (T. 622).

Withess Daniel testified that he first saw the diesel engine while they were in the process of shoving cars into the repair track and that if there had been a blue light on the cars, he would have started all of what he did much sooner and in all likelihood, would have had it completed if the blue light had been placed as it should have (T. 666-667). Witness Luginbill testified

that if the blue flag derail had been up, the accident would not have occurred because the train would have been prohibited from coming into the track where the diesel engine was located (T. 777).

IV.

The Trial Court properly instructed the jury with regard to damages and properly reduced the finding of damages by the jury by 50 percent. In any event, Plaintiff has waived any right to complain of the action of the Trial Court in this regard because Plaintiff failed to object in any respect to this portion of the charge of the Court.

This case was submitted to the jury by a general charge with special interrogatories. Even though the Court was submitting the case on special interrogatories, the Court felt that the jury should be informed of the effect of their answers by a general charge and accordingly, instructed the jury in the first part of the charge on negligence and contributory negligence as follows:

> "For the Plaintiff to recover under the statute, it is sufficient if he proves by a preponderance of the evidence that the railway company, its agents or employees, other than the Plaintiff, was negligent and that its negligence in whole or in part caused the injuries, if any, to DeLaCruz.
>
> You are further instructed that if it is shown by a preponderance of the evidence that DeLaCruz was negligent and that his negligence in whole or in part caused his injuries, if any, the amount of damages, if any, *you find* in answer to Special

> Issue Number 6 will be reduced to the extent that you find from a preponderance of the evidence the negligence of DeLaCruz contributed to the injuries, if any, of DeLaCruz." (Emphasis added).

Undoubtedly, an instruction of this type informing the jury of the effect of their answer is beneficial to the Plaintiff and you can be sure that Plaintiff would have objected if the Charge had omitted such an instruction and in addition, you can be assured that Plaintiff would in jury argument so inform the jury of the effect of their answers even if the Court had not done so.

This portion of the Charge just quoted was on page 3-a and on page 7, completely separated from such instruction was Special Issue No. 6 which reads in its entirety as follows:

> "What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably and fairly compensate Manuel O. DeLaCruz for the injuries, if any, sustained by him as a result of the occurrence in question?
>
> You are instructed that you may take into consideration the following elements and factors or such of the same, if any, as are proven, and no other:
>
> (a) Physical pain and suffering which he has suffered in the past from the date of the occurrence to the date of this trial, and in the future as he will reasonably and probably suffer in the future.

(b) Loss of earnings he has sustained in the past from the date of the occurrence to the date of this trial, and diminished capacity to work and earn money in the future as he will in reasonable probability sustain in the future.

(c) Reasonable and necessary doctors and hospital and medical expenses incurred in the past from the date of the occurrence to the date of this trial and which in reasonable probability will be incurred in the future.

Answer in dollars, if any, and cents, if any.

ANSWER $12,000."

Without question, Special Issue No. 6 clearly directed the jury as to the elements that they were to take into consideration in arriving at an amount. In no sense could the jury have concluded that they were to reduce their findings by any amount. Also, it is clear that the wording of the general instruction could not have been confusing to the jury as suggested by Plaintiff in view of the words "the amount of damages, if any, you find in answer to Special Issue No. 6 will be reduced" for the reason that this clearly tells the jury that whatever they find in Special Issue No. 6 will be reduced by the Court. We do not see how any other meaning could be concluded from such language.

However, if there was any confusion or ambiguity in this regard, the only complaint that Plaintiff would have on appeal would be that the Court erred in its Charge. No objections on behalf of Plaintiff to the

Charge of the Court are before this Court and therefore in accordance with Rule 51, Federal Rules of Civil Procedure, Plaintiff cannot complain of the instruction given by the Court.

RESPONSE TO PLAINTIFF'S REASONS FOR GRANTING THE WRIT

I.

Plaintiff asserts that this Court should grant the writ of certiorari because the ruling of the Court of Appeals in this case is contrary to the ruling of the Third Circuit Court of Appeals in *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996.

This contention of Plaintiff is based solely on the testimony of the Plaintiff to the effect that he did not place a blue light on the diesel engine in question because he had been told by his foreman that all of this had been taken care of.

It is true that this is the story that Plaintiff told to the jury at the trial, but Plaintiff failed to point out to the Court that this testimony was impeached. In the first place, Plaintiff had seen the switch engine move in and out of the repair track so that he knew that the blue flag derails were down. Also, after the accident occurred, Plaintiff gave a statement to his employer and at the trial, this statement was marked as Defendant's Exhibit 11 (T. 220). A portion of this signed statement of Plaintiff was read into evidence as follows (T. 223-224):

"Foreman Patterson instructed Machinist Jen-

> kins and I to change out the Number 1 idler wheels on Diesel engine 80-L on the drop pit on repair track and told me how they were going to move the engine to the pit *so I knew the yard would have to do this and felt sure knowing the work was to be done that we were going to be protected so I did not give any further thought to placing blue light or blue flag* on the engine as we had a portable floodlight set up shining on the engine, two big light bulbs on pole next to engine, cab lights, marker lights and engine room lights of engine burning and plenty of light around so the engine was clearly visible to anyone approaching it at all." (Emphasis added).

In this statement, Plaintiff very clearly states that he just assumed that they were going to be protected and he did not give any further thought to placing a blue flag or blue light on the engine. Certainly this contradicts his statement that he was specifically told by Foreman Patterson that the blue flag derail had been placed on the track. Under the evidence, the jury certainly had the right to disbelieve what the Plaintiff said in this regard and the rule is so stated in *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 649 as follows:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Tennant v. Peoria & P. U. R. Co. 321 US 29, 88 L ed 520, 64 S Ct 409, 15 NCCA (NS) 647; Lavender v. Kurn, 327 US 645, 90 L ed 916, 66 S Ct 740, supra. Once there is a reasonable basis in the

> record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 US p 652, 90 L ed 922, 66 S Ct 740). And where, as here, the case turns on controverted facts and the credibility of witnesses, the case is peculiarly one for the jury. Washington & G. R. Co. v. McDade, 135 US 554, 572, 34 L ed 235, 241, 10 S Ct 1044; Tiller v Atlantic Coast Line R. Co. 318 US 54, 68, 87 L ed 610, 618, 63 S Ct 444, 143 ALR 967."

Under these authorities, the jury could have completely discounted this testimony of Plaintiff about what he was told by Foreman Patterson. But even if this were not so and even if the jury believed what Plaintiff said, this would not excuse Plaintiff from his own failure to comply with the blue flag rule. Plaintiff relies entirely upon the case of *Paluch v. Erie Lackawanna R.R. Co.*, 387 F.2d 996 and we submit that there are many distinctions in the two cases.

First, in *Paluch* it was undisputed that Plaintiff had been told by his foreman that the pole in question was safe.

Second, the plaintiff in *Paluch* was totally inexperienced in climbing poles, but Plaintiff DeLaCruz had been woking for Defendant Santa Fe in these same yards for 16 years, so that he was far from being inexperienced.

Third, the basis for contributory negligence in *Paluch* was the contention of defendant that plaintiff did not find the pole defective prior to the accident in question. The foreman had told plaintiff that the pole was safe and this is precisely the subject matter of the alleged contributory negligence. The same cannot be said about the case now before the Court when you consider the acts of contributory negligence and the alleged statements made by Foreman Patterson to Plaintiff.

The Fifth Circuit Court of Appeals had no trouble distinguishing *Paluch*, but even if it cannot be distinguished, the Fifth Circuit has followed the prior decisions of this Court. We have cited these decisions earlier beginning with *Rogers v. Missouri Pac. Co.*, 352 U.S. 500 and we need not cite them again. Plaintiff would assert that this case and those that followed held that a plaintiff should recover in every F.E.L.A. case. Instead, this Court has held that negligence, contributory negligence and causation should be decided by a jury and not by a Court. If this is good law when a plaintiff wins in the trial court, then it should be good law when the defendant wins in the trial court.

This very Defendant has been before this Court many times asserting that a jury finding of negligence on the part of the Defendant should not stand because of some rule of law concerning the duty owed by an employer to an employee at common law. For instance, in *Deen v. Gulf, Colorado and Santa Fe Ry. Co.*, 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed.2d 718, a lower appel-

late court (*Gulf, Colorado & S.F. Ry. Co. v. Deen*, 275 S.W.2d 529) held that defendant Santa Fe was not liable to plaintiff because it had furnished to plaintiff a reasonably safe means of doing a job and had no duty to furnish another safe means of doing the same job. Undoubtedly this proposition of law was supported by ample evidence such as *Western Union Telegraph Co. v. Coker*, 146 Tex. 190, 204 S.W.2d 1977; *L&N Ry. Co. v. Davis*, 6th Cir., 75 F.2d 849; *Wolfe v. Henwood*, 8th Cir., 162 F.2d 998; *Fore v. So. Ry. Co.*, 4th Cir., 178 F.2d 349; *McGivern v. No. Pac. Ry. Co.*, 8th Cir., 132 F.2d 231; and *Thompson v. Pa. Ry. Co.*, 6th Cir., 88 F.2d 148. However, this Court chose not to follow those cases but instead, held:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

We submit that this same reasoning and holding should be made in this case irrespective of the holding of the Sixth Circuit in *Paluch v. Erie*, supra.

II.

Under this point, Plaintiff asserts that there is no causation between the contributory negligence of Plaintiff and the accident in question. In so doing, Plaintiff quotes from the Restatement of Torts and thereby asserts that Defendant had the burden of proving that the contributory negligence of Plaintiff was a "substantial factor in bringing about his harm."

Not only does Plaintiff feel that every plaintiff in an F.E.L.A. case should win, but is apparently now asserting that in order for this to be accomplished, the rules with regard to causation should be different for plaintiff and defendant.

Fortunately, the courts disagree. For instance, in this very case, the Trial Court submitted the causation issue with regard to contributory negligence in the following language:

> ". . . . played any part, no matter how small, in bringing about or causing Plaintiff's injuries."

Plaintiff made no objection at all to the submission of the causation issue in this matter and of course, it is well accepted that this is the standard to be used in instructing the jury both as to the primary negligence of Defendant and the contributory negligence of Plaintiff. This question was thoroughly considered by the Fifth Circuit in *Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, and the Court very correctly concluded that the standard to be used on causation in both primary negligence and contributory negligence should be the same.

On page 11 of his Petition for Writ of Certiorari, Plaintiff quotes the testimony of a switchman and based upon this testimony Plaintiff asserts that the accident would have occurred even if there had been a blue light on the diesel engine. Plaintiff forgot to tell this Court that this same switchman on cross-examination testified as follows:

> "Q According to that statement, also, if there

had been a blue light on the cars, you would have started all of this much sooner, and in all likelihood would have had it completed or you could have given some warning earlier, if the blue light that should have been on there, was on there. Is that correct?

A That is right, sir." (T. 666-667).

III.

We have already pointed out that a careful reading of the Court's Charge shows that the Court did not in any respect instruct the jury to reduce the damages in any respect. The general instruction told them what would happen to their verdict and if the jury followed the Court's instructions, then the answer to Special Interrogatory No. 6 comprised the total amount of damages which the jury found that the Plaintiff had sustained.

CONCLUSION

Contrary to what Plaintiff asserts, this case does not present important questions which should be decided by this Court. If this Court should grant writ of certiorari in this case, then it would be an acknowledgment that this Court is once again going back to the practice of permitting appellate courts to determine issues of fact rather than the jury. This Court has steadfastly held to the proposition that only a jury is going to decide these issues since the decision in the *Rogers* case and we feel confident that this Court is not going to make an exception just because Defendant has won for a change. If the Court feels

that the evidence on contributory negligence of Plaintiff was weak, we suggest that the Court go back and read the evidence in other decisions by this Court where the Plaintiff has won in the trial court. These decisions are well known to this Court and certainly the Court will agree that in many of such cases, the inference of negligence was weak at best.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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JOE BRUCE CUNNINGHAM
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1905 Continental Life Building
Fort Worth, Texas 76102
Attorneys for Respondent

Of Counsel:

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I certify that a copy of the foregoing Reply to Petition for Writ of Certiorari has been mailed on the 7th day of April, 1969 to Otto B. Mullinax, Mullinax, Wells, Mauzy, Levy & Richards, 1601 National Bankers Life Building, Dallas, Texas, Attorneys for Petitioner.

Luther Hudson

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1231

MANUEL O. DELACRUZ,

Petitioner

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent

PETITIONER'S REJOINDER TO RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
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TO SAID HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

A comparison of the Application and Reply demonstrate the following:

1. Issue is not joined to the first question presented. Petitioner presents a question of law as to (1) the railroad's conduct precluding contributory negligence and (2) the Petitioner's conduct could not legally contribute to the accident.

2. Issue is not joined as to the second question presented. Petitioner complains *not* of error in the charge on damages, but of the Court again reducing the damages the jury awarded Petitioner, after telling the jury to do so.

3. Respondent would persuade the Court that Petitioner presents only disputed fact issues. When the printed record is before this Court on the merits, we shall fully brief these matters to show that respondent's efforts inject irrelevant minutae of testimony which we now respond to in capsulated form:

A. Respondent presents irrelevant evidence as to a "normal" operation, when the undisputed facts showed an abnormal operation where this petitioner had never worked in this pit on this track in 16 years with the company.

B. Each repair track had its own safety derail and locks; thus, operation on track 2 would not alert one to danger on track 1.

C. Petitioner worked in a separate department from the carmen and was not expertise in their customs or warning system.

D. The statement in the *Reply* (p. 14), "In spite of the fact that plaintiff knew that the switching crew would normally expect that there would be no machinist working on rip track No. 1, the evidence was undisputed that plaintiff had not complied with the blue flag rule" is indicative of the non-joinder because on this day they were not supposed to! (T. 202)

Furthermore, the statement ". . . that plaintiff was well aware of the fact that the switch-

ing crew was moving cars in and out of the repair tracks"[1] again begs the question because for the switching crew too have come upon track No. 1 *was no evidence that the switch crew was not fully aware of the disabled engine and the workmen under it and taking due care to avoid it, as Petitioner had been advised. There was no evidence of a rule or order that prohibited a switch crew from coming upon the repair tracks while repairs were being made and indeed this often happened.* To the contrary, word "is sent out that a *certain track is being opened* and a move will be made in that area, and everybody stay in the clear during that period of time." (T. 739). *No such warning was given Petitioner that track #1 was being opened!*

4. Beginning on page 20 ff. Respondent does respond to the *Paluch* case for the first time. And the Railroad seems to present four arguments, which we understand to be as follows:

A. There was no representation by the supervisor that the work area was safe because the jury need not have believed the Petitioner. But the evidence is undisputed to the contrary even if Petitioner be not believed. Impartial and unimpeached witness Jenkins testified to the content of the same warning (T. 525, 533-

[1] There was no such admission as to track 1, which had its own derail protection.

534). Witness Bixenmann heard Supervisor Patterson say the yardmaster knew a crew was working on Rip 1 (T. 572) and the yardmaster has a duty to notify the switch crew when machinists are working on Rip 1 (T. 613); and switchman Daniels admitted that the switch crew ". . . knew you was down there and we had orders to that effect, and we seen you down there before." (T. 540). Respondent's supervisor and agent, Patterson, was not called by the Railroad to testify, thereby raising a presumption that he would not dispute what was said. *Mallory & Co. v. N.L.R.B.*, 400 F.(2) 956 at p. 959 (C.A. 7th Cir. 1968). This elevates facts to the plateau of being undisputed.

While a plaintiff need not be believed by a jury, absent corroboration, because of his interest; with corroboration he and the corroborating evidence is entitled to be believed. *Continental Nat. Bank v. Conner,* 147 T. 218, 214 S.W. 2d 928; *Ex parte Rohleder,* 424 S.W. 2d 891; *Hideburgh v. Palvio,* 274 S.W. 2d 94, N.R.E. It is the height of something or other to assert that what plaintiff swears to is impeached by a prior statement which does not advert to the questioned testimony at all. (See Reply bottom p. 20-top p. 21). This Petitioner under any rule of construction was not an impeached witness.

B. Secondly, Respondent seems to say that

Paluch v. Erie & Lackawanna R.R. Co. (3rd Cir.) can be distinguished (but p. 23 doesn't seem to like the one used by J. Aldrich in his opinion), and would distinguish it as follows:

(1) Respondent finds that in *Paluch* the plaintiff was told by his foreman that the pole was safe, when it wasn't, but fails to draw the parallel. *Here* the foreman said "you fellows are safe, everything has been taken care of," when it wasn't.

(2) Respondent finds in *Paluch* that the plaintiff was totally inexperienced in climbing poles, and that Petitioner here was an experienced mechanic. But in *Paluch* the plaintiff didn't get hurt by his inexperience in climbing the pole, but in relying on the foreman that the pole was safe.

By parallel (although Respondent failed to note it), petitioner didn't get hurt from going in the pit and doing his work, but in relying on the foreman that the work area was safe. In this respect petitioner also was inexperienced, never having worked there before.

(3) Respondent finds in *Paluch* a distinction because the ground of negligence contended for by the Railroad that Paluch was negligent in failing to find the pole

defective. Somehow this is different from a contention in this case by the Railroad that petitioner did not find the work area unsafe, or to be more accurate "in placing himself in a hazardous position."

C. Thirdly, Respondent seems to be saying: If there was a representation of safety made to Petitioner by the Railroad, which would normally preclude Petitioner's negligent conduct, it should be disregarded since the jury found plaintiff contributorily negligent anyway, and rules of law shouldn't apply.

D. Finally, Respondent infers that a railroad's negligence may never be the sole immediate cause of an injury because the employee was *there* to be injured. Q.E.D., since the plaintiff was *there* and was injured, the fact that his earlier conduct was irrelevant, does not excuse him. But this is not the lesson of *Lavender v. Kurn,* 327 U.S. 645, 653, or *Paluch.* To the contrary, the rule is still that there must be legal causation. Petitioner's blue flag would have done no more to stop this train than the failure of the brake light to come on would have avoided a rear-end collision in *Dobson v. Gulf Supply Co.,* 399 S.W. 2d 882, n.r.e., when defendant there saw plaintiff's car stopping and could not himself stop in time.

The *Paluch* case cannot be distinguished from this case.

CONCLUSION

This writ seeks to bring before the Court a matter of great importance to the jurisprudence as it applies to F.E.L.A. cases.

Indeed, the fact that the railroad company could not join issue with Petitioner, on his application, argues strongly for a summary reversal to square the law of the Fifth Circuit with that of the 3rd,[2] and that justice may be done this injured Petitioner.

Respectfully submitted,

MULLINAX, WELLS, MAUZY & COLLINS

By .....
Otto B. Mullinax

By .....
L. N. D. Wells, Jr.

Attorneys for Petitioner

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[2] Not Sixth Circuit as Respondent asserts p. 24.

CERTIFICATE OF SERVICE

IT IS CERTIFIED that on the ..... day of May, 1969, a copy of the foregoing Petitioner's Rejoinder to Respondent's Reply to Petition for Writ of Certiorari was mailed to Joe Bruce Cunningham, 1905 Continental Life Building, Fort Worth, Texas 76102, Attorney for Respondent.

.....

Otto B. Mullinax